STATE OF NEW JERSEY
BOARD OF PUBLIC UTILITIES

I/M/O the Ownership of Renewable Energy Certificates ("RECs") Under the Electric Discount and Energy Competition Act, as it Pertains to Non-Utility Generators and the Board's Renewable Energy Portfolio Standards	)))))))	**Docket No. EX04080879**

COMMENTS OF
WHEELABRATOR FALLS INC. AND WHEELABRATOR GLOUCESTER COMPANY L.P.

By Order dated August 18, 2004, in Docket Nos. E04040288 & EX04080879 the Board of Public Utilities (the "Board") issued a set of questions in the above captioned docket. Wheelabrator Falls Inc. and Wheelabrator Gloucester Company L.P. (collectively "Wheelabrator") are pleased to submit these Comments in response to the Board's questions.

As noted in the Notice and Proposal, each of the two Wheelabrator waste-to-energy resource recovery non-utility generators ("NUGs") have long-term power sales contracts with a New Jersey electric distribution company utility ("EDCs") (the "Wheelabrator Agreements"). Wheelabrator Falls Inc., a 53 MW NUG in Falls Township, PA, sells its power to Public Service Electric & Gas Co. and Wheelabrator Gloucester Company L.P., a 14 MW NUG in West Deptford, NJ, sells its power to Jersey Central Power & Light Co. Neither of these contracts contains any express provision addressing the issue of Renewable Energy Credits ("RECs").

1) Does the State have jurisdiction to decide the issue of the ownership of RECs[1]? In your discussion, please consider the recent decisions in American Ref-Fuel Company, et al. (105 FERC ¶ 61, 004, October 1, 2003) and (107 FERC ¶ 61, 016, April 15, 2004) ("ARF Decision") denying motions for rehearing and reaffirming earlier decision) and discuss any relevant preemption or other jurisdictional issues.

As explained below and also in Wheelabrator's Notice of Appearance and Proposal, dated July 1, 2004, and submitted in Docket No. EO04040288 (the "Notice and Proposal") - a copy of which is incorporated herein by reference and attached hereto for ease of reference - Wheelabrator believes that neither the executive branch nor the legislative branch of the State of New Jersey has the jurisdiction to require Wheelabrator to transfer for no consideration RECs associated with the two Wheelabrator facilities to the utilities that purchase the power output from those facilities under the Wheelabrator Agreements.

A. The Import of the FERC *ARF Decision* is to Deprive the EDCs of What Has Been Their Primary Line of Attack by Denying Them the Use of the PURPA statute and FERC Regulations Thereunder to Claim Title to the Wheelabrator RECs

In numerous proceedings, including the BGS proceeding from which this docket was severed, the EDCs have argued that because the federal statutory scheme of PURPA required the EDCs to purchase power from renewable energy Qualifying Facilities ("QFs") – such as the two Wheelabrator NUGs –the renewable energy attributes must

[1] These Comments will use the term "RECs" to refer to the renewable energy attributes associated with the Wheelabrator Facilities. RECs are also known by many other descriptive terms including, for example, "certificates" and "green tags."

have been transferred along with the energy and capacity commodities that were purchased. [2]

This argument has been explicitly and definitively laid to rest by the *ARF Decision.* FERC was quite clear that, in the absence of specific contract language, the federal statutory scheme does not require that the QFs contract away their RECs to the purchasing utilities as part of their PURPA contracts.

Specifically, FERC ruled on October 1, 2003, that its avoided cost regulations governing mandatory purchases by utilities of electricity generated by QFs under Section 210 of PURPA "did not contemplate the existence of RECs and that the avoided cost rates for capacity and energy sold under contracts entered into pursuant to PURPA do not convey the RECs, in the absence of an express contractual provision." *American Ref-Fuel Company*, 105 FERC ¶ 61,004 at Par. 3 (2003), *rehearing denied* 107 FERC ¶ 61,016 (2004), *petition for review pending sub nom. Xcel Energy Services Inc. v. FERC*, Case No. 04-1182 (D.C. Cir. filed June 14, 2004).

The EDCs have argued that the renewable energy attributes were somehow bound up in the definitions of "net electric output" or "Contract Power Output" set out in their respective agreements. However, this defies logic. Electricity has never been defined to include the fuel used to generate the power output - just as electric power does not

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[2] Not surprisingly, the EDCs have never argued that they are "entitled" to those environmental attributes that burden the waste-to-energy facilities, such as the hundreds of millions of dollars in air pollution control retrofits that this industry has paid for over the past 20 years. See, e.g., the attached Motion of the Electric Power Supply Association for Leave to Intervene Out of Time and Grant the Petition (July 25, 2003), filed in the *ARF Decision* docket.

include within its ambit the real estate that sits beneath the facilities or the labor that is used to operate the plants or any of the other means of power production.

The FERC ruling, in this respect, was consistent with the Commission's earlier precedent holding that environmental attributes of generation are separate and distinct from, and not conveyed with, power sales from a generating facility. For instance, the Commission had found that the trading of emissions allowances established under the Clean Air Act Amendments (CAAA) does not constitute the sale of electric energy subject to Part II of the Federal Power Act and can occur independently of the sale of power.[3]

This logical point was further enhanced by the unique particulars of the PURPA scheme. Both PURPA and the FERC's implementing regulations expressly provide for the pricing of QF power at the purchasing utility's "avoided costs", i.e., the utilities' alternative cost of generating or producing the same amount of power. Thus, QFs are paid for energy and capacity produced by their facilities based on the purchasing utility's alternative costs of power from any power source, not on any attributes of the selling QF.[4] Further, once a utility's avoided costs are determined, the same power purchase price applies to all QFs, be they renewable energy resources or fossil fuel-fired cogenerators. Accordingly, avoided cost, as defined by the FERC, compensates QFs for a generic energy and capacity product that is unrelated to the environmental attributes of the selling facility.

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[3] *Edison Electric Institute*, 69 FERC ¶ 61,344 (1994).

[4] Indeed, where based on the cost of an incremental power plant addition, utilities' avoided costs have typically been based on fossil fuel-fired units.

What qualifies a facility as a QF under PURPA, including the use of renewable sources of energy, has no impact on the determination of avoided cost and should not be reflected in it.[5] Avoided cost, therefore, cannot be deemed to compensate QFs for RECs associated with renewable generation.

In 1995, the FERC expressly held that a State's avoided cost determination may not reflect or include the value of environmental externalities associated with QFs. In explaining why the use of adders reflecting a QF's environmental performance to calculate avoided cost violates PURPA, the Commission found that the State "may not set avoided cost rates or otherwise adjust the bids of potential suppliers by imposing environmental adders or subtractors that are not based on real costs that would be incurred by utilities."[6] While a State may account for environmental costs in the

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[5] "[T]he Commission's regulations are clear that the rate to be paid by utilities for electric energy be determined according to the avoided cost to the *utility* of generating that energy or purchasing it elsewhere, and not according to the QF's efficiency. . . . The cogenerator's efficiency is relevant in determining whether it qualifies under PURPA as a QF; however, the QF's efficiency is entirely unrelated to the *utility's* avoided costs." *Independent Energy Producers Association, Inc. v. California Public Utilities Commission*, 36 F.3d 848 (9th Cir. 1994) (emphasis in original). The concept of avoided cost thus reflects a balancing of the congressional interests reflected in section 210 of PURPA. Congress sought to encourage development of efficient cogeneration and alternative energy sources, but not to require utilities to pay more for QF power than the utilities' alternative cost of power from other sources. While cogeneration and small power production facilities must meet threshold ownership and technical standards to be eligible for any of the benefits of PURPA, QFs are not entitled to special payments for their environmental attributes under FERC's avoided cost rules. *See Southern California Edison Company, et al.*, 71 FERC ¶ 61,269 at 62,079 (1995) ("In promoting greater fuel diversity, however, Congress was not asking utilities and utility ratepayers to pay more than they otherwise would have paid for power.")

[6] *Southern California Edison Company, et al.*, 71 FERC ¶ 61,269 at 62,081 (1995). In that case, the California Public Utilities Commission had established a Biennial Resource Plan Update (BRPU) that would have allowed QFs to bid to displace certain utilities' Identified Deferrable Resources (IDRs). Under the BRPU, the QF winning the bid would have been paid an air emissions adder/subtracter based on the difference in projected emissions between the bid-winning QF and the IDR.

determination of avoided cost, these must be environmental costs that would otherwise be incurred by the utility, not environmental benefits that are associated with renewable QFs.[7] The argument that a utility purchases energy and capacity, and RECs, when it pays a QF the utility's avoided cost is flatly inconsistent with these holdings.

As the FERC further ruled in *the ARF Decision*, "the avoided cost that a utility pays a QF does not depend on the type of QF, i.e., whether it is a fossil fuel cogeneration facility or a renewable energy small power production facility" and the avoided cost rates "are not intended to compensate the QF for more than capacity and energy." *Id.* at Par. 22.

The EDCs have also argued several times that the RECs belong to them as a matter of ratepayer equity.[8] Most recently, for example, the EDCs argued in their Motion to Sever that, were the EDCs to prevail in their position,

> "the New Jersey ratepayers would get the full benefit of the NUG energy they are paying for. Were Wheelabrator to prevail in its arguments, New Jersey customers would effectively have to 'pay twice'". Id. at page 12.

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[7] *Id.* States can compensate the environmental externalities associated with renewable generation, as long as such externalities do not affect the calculation of avoided cost. *See CGE Fulton, L.L.C.*, 71 FERC ¶ 61,232 (1995) (upholding an Illinois law that allowed solid waste QFs to sell their power to utilities above avoided cost, because the utilities were entitled to a tax credit for payments in excess of the avoided cost and the QFs were eventually required to reimburse the State for the tax credits).

[8] See, e.g., the arguments made by PSE&G to the FERC in its Motion to Intervene and Protest in the *ARF* proceedings, dated July 21, 2003: "The [ARF] petition is little more than a blatant attempt to…glean additional revenue from projects that are already receiving handsome returns based on 1980s-era long-term avoided cost forecasts." *Id.*, at page 3, and "Moreover, the largest impact of a Commission order granting Petitioners' request would be to increase the already-significant returns QF owners receive for their generation investment, at the expense of utilities, other retail suppliers, and their customers." *Id.*, at page 11.

By invoking the economic bargain between the QFs and the ratepayers, the EDCs have shown their true colors – an attempt to undo what they perceive to be an injustice brought on by the fact that some of the PURPA contracts require rates above subsequent short-term avoided costs. However, this basis of attack is not available to the EDCs. Under *Freehold Cogeneration Associates, L.P. v. Board of Regulatory Commissioners*, 44 F. 3d 1178, 1191-92 (3d Cir. 1995), *cert. denied*, 516 U.S. 815 (1995) ("*Freehold*"), long-term contract rates set in reliance on long-term avoided cost projections made at the time of the PURPA contract cannot be revisited by state public utility commissions.[9]

In summary, FERC held that "contracts for sale of QF capacity and energy, entered into pursuant to PURPA, likewise do not control the ownership of RECs (absent an express provision in the contract)." *Id.* at Par. 23. The Board does not have the jurisdiction to conclude otherwise.

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[9] See Re: Complaint and Petition of Maine Public Service Company Regarding a June 4, 1984 Power Purchase Agreement Between Itself and the Wheelabrator-Sherman Energy Company, Docket No. 94-301 (Maine Public Utilities Commission, January 19, 1995). "We agree that PURPA preempts any state action designed to avoid the right of QFs to receive payments for power pursuant to the rate established in a long-term contract entered into with an electric utility. The statutory and regulatory history of PURPA could hardly be more clear in expressing the intent that an electric utility's avoided costs be estimated at the time a QF contract is entered into and that the price for power established according to those estimates be guaranteed over the term of the contract. We find 18 C.F.R. § 292.304 (b) (5) and FERC's comments on that provision to be particularly persuasive in clarifying FERC's intent. FERC's comments clearly describe FERC's intention to allocate to the utility the risk that the required contract price might turn out in some instances to be higher than the utility's actual avoided costs. FERC's rules purposefully protect the contract price afforded to QFs in order to ensure the revenue stream necessary to stimulate investment in the QF industry." Id. at p. 34.

B. There is No Authority Under Any New Jersey Law – whether New Jersey Statute, Board Regulation or Order - for an Automatic Conveyance of RECs

FERC held in the *ARF Decision* that, in the absence of any federal authority requiring the automatic forfeiture of a QF's RECs, the only such authority that could exist would need to be found under State law. No such authority exists under New Jersey law. Despite conclusory allegations by the EDCs that the New Jersey Electric Discount and Energy Competition Act ("EDECA") and the Board's RPS Regulations require QFs to transfer their RECs to the utilities as part of their power sales agreements, no such requirement has been explicitly identified by the EDCs. Nor could it. The statutes and regulations are as silent on this point, as are the Wheelabrator Agreements. The sum total of the EDC arguments in this regard amount to two points. Early on, they argued that the RECs were somehow bound up in the various contractual definitions of electricity.[10] JCP&L, e.g., argued that the RECs were included in the WGI Agreement's definition "net electric output"[11]. Similarly, PSE&G argued that the RECs from WFI were included in that facility agreement's definition of "Contract Power Output".[12] This sortie has now been defeated by the FERC rulings in the *ARF Decision*. The EDCs have pointed to no provision of New Jersey law that would lend support to a different interpretation of what constitutes electric power than the view held by the FERC.

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[10] The EDCs have admitted in their papers, both in the relevant Board dockets and in the various federal filings they have made, that the power sales contracts at issues herein are silent with respect to any explicit mention of renewable energy credits or related environmental attributes. This makes sense given the fact that RECs were only created in the past few years, long after the Wheelabrator Agreements were entered into.

[11] See, e.g., page 2 of that certain letter from JCP&L to Lawrence W. Plitch, Counsel to Wheelabrator, dated January 27, 2003, and attached hereto.

[12] See, e.g., of that certain letter from Sy Wodakow, PSE&G, to Lawrence Plitch, Counsel to Wheelabrator, dated February 11, 2003, and attached hereto.

The second argument put forth by the EDCs for their proposition that New Jersey law has bound up RECs into electricity rests on the specific provisions of the EDECA's renewable portfolio standard ("RPS"). In particular, the EDCs have made much of the fact that these RPS obligations are expressed in terms of an obligation to maintain a certain percentage of "renewable energy" in their power portfolio, not renewable energy credits or attributes or any such derivative product. In fact, they point out that, with the exception of solar energy RECs, the Board has yet to authorize the creation of RECs and is waiting for the PJM GATs system (or its equivalent) to be implemented. See NJAC 14:4-8.8(c).

The existence of RECs in New Jersey, however, can be evidenced in a number of ways. First, the legislation itself contemplates the creation of RECs in New Jersey.[13] It has been well documented that a secondary market for renewable attributes helps achieve the goals of RPS statutes in a number of ways, including increasing liquidity and facilitating the transfer of RECs from resource bound renewable energy facilities to the customer load pockets. In addition, there are a number of states in the Northeast that have either created or are about to create laws and regulations that would accept from their utilities RECs from renewable energy facilities in New Jersey and

[13] See Section 38.d. of the "Electric Discount and Energy Competition Act.": *An electric power supplier or basic generation* service *provider may satisfy the requirements of this subsection by participating in a renewable energy trading program approved by the board in consultation with the Department of Environmental Protection.* N.J.S.A. 48:3-87(d).

Pennsylvania as evidence of compliance with the RPS obligations in the foreign jurisdictions.[14]

Additional evidence that RECs exist in New Jersey can be found in the market place. There are RECs brokers in the area that have been monthly publishing the prices at which monthly RECs in New Jersey have been trading. [15] In other words, while the EDCs may want to maintain that RECs "do not exist" in New Jersey, the market is respectfully disagreeing.

The claim that renewable energy attributes cannot be unbundled from associated renewable energy in New Jersey surprisingly is also belied by the deeds of the EDCs themselves. In the BGS auctions held thus far, the Proposals issued by the EDCs to the potential bidders clearly allowed that the winning bidders, in satisfying their RPS obligations as load serving suppliers, could rely on the renewable energy that the EDCs had contracted for from their suppliers, including the two Wheelabrator facilities.[16] In other words, it appears that the EDCs engaged in the very separation of renewable energy attributes – regardless of whether they are called RECs or something else – that

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[14] Northeastern states with RPS laws that either accept or contemplate accepting RECs from facilities in the PJM Interconnect include: Connecticut, Maine, Maryland, Massachusetts, New York and Rhode Island.

[15] E.g., the August, 2004, Evolution Markets, LLC, "REC Markets Report" indicates for New Jersey Reporting Year 2005: Class I RECs at "$6/MWH Bid / $7/MWH Offer / $7.50/MWH Last" and Class II RECs at "$4/MWH Bid / $4.25/MWH Offer / $4.35/MWH Last".

[16] See the attached Exhibits taken from the BGS web site in late 2002 detailing the renewable attributes – including those from the two Wheelabrator facilities - that the two EDCs in this case were offering to make available to the winning bidders in the Auction to be held in early 2003. In fact, the most recent version of this data is posted to this very day on the BGS web site ("Data Less Frequent" page), despite the fact that this issue has been severed from the BGS Docket.

they claim is prohibited by New Jersey law.[17] Posed differently, how could the EDCs promise to "credit" to third-party winning BGS suppliers the renewable attributes associated with their power purchase contracts without somehow "unbundling" the RECs from the energy? This is particularly vexing given Wheelabrator's understanding that the EDCs are no longer in the power generation/supply business but have transferred their power sales contract entitlements to unregulated affiliates or other third party IPPs. If true, this would mean that the EDCs unbundled the RECs from the energy not once, but twice: once when they sold off their supply entitlements and retained the RECs and then again when they credited the RECs to the winning BGS suppliers.

In summary, there is much evidence for the proposition that unbundled renewable energy attributes from the Wheelabrator facilities exist, have market value as such and, in fact, have been separately transferred for value by the EDCs themselves. To argue that the EDECA and the Board's regulations have yet to allow the utilities' to satisfy their RPS obligations with anything other a required percentage of renewable energy - rather than with unbundled RECs - is simply a compliance matter between the EDCs and their regulators. This argument cannot give the EDCs *carte blanche* to reinterpret their

[17] While the Board Order in this Docket did not mention the timing of possible discovery, Wheelabrator hereby requests, in the interests of a fair and complete record on this factual question, the opportunity to ask the EDCs on the record about their history of conveying to winning BGS suppliers the renewable energy attributes associated with the Wheelabrator facilities. Alternatively, Wheelabrator would ask the Board Staff to either ask these questions directly in the interests of expediency or, if readily available from BGS docket records, simply supply the information necessary to answer these questions.

contracts with the NUGs to create a better economic bargain for themselves from the one originally intended by the parties.[18]

2) Assuming the ownership of state-created RECs is an issue to be determined by the State, is this a regulatory issue to be decided by the Board, pursuant to its Title 48 authority, or is this a contract issue to be decided by the courts?

Although There Is No Basis Under State Law to Depart from the FERC Ruling, the Final Determination of Any Such Question Rests with the Courts, Because Any New Legal Requirement Ordered by the Board Subsequent to the Original Board Approval of the Wheelabrator Agreements Would Amount to Utility-Type Regulation Prohibited by Section 210 (e) of PURPA.

The power sales agreements between electric companies and QFs such as WFI or WGI are contracts executed pursuant to PURPA. The only exception to the broad reservation of jurisdiction over wholesale contracts provided to FERC under the FPA is PURPA's narrow grant of authority to state utility commissions to determine in the first instance the avoided cost rate at which utilities can be required to purchase energy from QFs.[19]

In order to further the development of QFs, Congress ordered FERC to issue regulations which exempted QFs from "State laws and regulations respecting the rates,

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[18] The fact that two Wheelabrator Plant Managers have signed affidavits stating that the Wheelabrator facilities sold their renewable energy in prior years to the EDCs and to no one else is, frankly, a red herring. No one is contesting this fact. Rather, the issue is whether the Wheelabrator Facilities ever sold their RECs to anyone. To this question, the answer is no – not even to the EDCs. If the EDCs truly believe that these affidavits are somehow dispositive of the ultimate legal issue in dispute herein, Wheelabrator would suggest that the Board should investigate the circumstances under which these requests for affidavits were directed to Wheelabrator Plant Managers rather than to Wheelabrator's legal counsel.

[19] See *Freehold*: State regulatory commission jurisdiction over wholesale power contracts is limited to procedures that "*implement* the requirements of section 210(a) [of PURPA] and the relevant regulations" but state action not involving such implementation is preempted by federal law. (Emphasis in original).

or respecting the financial or organizational regulation, of electric utilities." Section 210(e) of PURPA, 16 USC § 824a-3(e); see 18 CFR § 292.602(c)(1).

PURPA and its implementing regulations therefore establish an "extensive federal system to encourage and regulate the sale of electrical energy by QFs." Freehold, supra, 44 F.3d at 1191. Under this federal system, once a state utility commission approves an EPA between an electric company and a QF on the grounds that the purchase rates are consistent with avoided cost, any action or order by the state commission to reconsider its approval is preempted by federal law. Id. at 1194. [20] Any attempt to reconsider QF contracts – as the EDCs are attempting - impermissibly imposes utility-type regulation over QFs and is preempted. Id. at 1193. See Crossroads Cogeneration Corp. v. Orange & Rockland Utilities, 159 F.3d 129, 138 (3d Cir. 1998) (once a QF contract is approved, "the state agency is not permitted to modify the terms of the agreement. To do so would be to engage in the utility-type regulation from which PURPA exempts QFs").

In particular, any attempt by the Board to read the sale of RECs into these FERC-regulated PURPA agreements would be preempted under the contract non-interference principle enunciated in Freehold.[21] As the Freehold court stated, after a state

[20] The WFI Agreement was approved by the Board in *I/M/O the Joint Petition of Public Service Electric and Gas Company and Wheelabrator Falls, Inc. for Approval of a Power Purchase and Operations Coordination Agreement*, BPU Docket No. EM92010035 (June 4, 1992). The WGI Agreement was approved by the Board in *I/M/O the Application for Approval of the Power Purchase Agreement Between SES Gloucester Company, L.P. and Jersey Central Power and Light Company*, BPU Docket No. EM87111313 (February 8, 1988).

[21] See also Smith Cogeneration Management, Inc. v. The Corporation Commission and Public Service Co. of Oklahoma, 863 P.2d 1227 (Okla. 1993).

commission has approved a QF sales arrangement, any attempt to "modify the [arrangement]....is 'utility-type' regulation – exactly the type of regulation from which [a QF] is immune under [Section 210(e) of PURPA]."[22]

The position advocated by the EDCs in this docket seeks to violate this "contract non-interference" policy of PURPA. It asks the Board to interpret the Wheelabrator Agreements such that a valuable asset (their RECs) will be removed from Wheelabrator and transferred to the EDCs, to the financial detriment of the Wheelabrator. PURPA has nowhere delegated to the states the right to transfer QF property to a third party.

In the long run, PURPA's contract non-interference policy was designed to protect both QFs and ratepayers. PURPA applies even if changed circumstances result in ratepayers paying more than short-term market prices. As the FERC Staff noted in its original comments to the Section 210 regulations: "This [long-term rate lock-in] provision can also work to preserve the bargain entered into by the electric utility; should the actual avoided cost be higher than those contracted for..." Federal Register, Volume 45, No. 38 (February 25, 1980). "That fact...does not give us license to rewrite the contract to impart a meaning that the parties never intended. Instead, we hold [the utility] to the bargain [it] ... made and to the risk it ... took—that is, the risk that ... utility-type regulatory authority might not apply to cogeneration contracts." Oregon Trail Electric Consumers Cooperative v. Co-Gen. Co., 168 Or. App. 466, 484, 7 P. 3d 594, 606 (2000), cert. denied, 322 Or. 137, 27 P.3d 1043 (2001).

[22] Freehold, 44 F.3d at 1192.

The EDCs argument that the Board somehow has the jurisdiction to reopen or reinterpret wholesale power agreements to require an involuntary transfer of RECs from the Wheelabrator facilities must necessarily be trumped by federal preemption over interstate commerce. For these reasons, it is Wheelabrator's position that the only branch of the New Jersey state government with possible jurisdiction to resolve this dispute would be the judicial branch in a contract action.

3) Assuming this is a regulatory issue to be decided by the Board, what factors should the Board consider? May the Board treat contracts entered into prior to the creation of RECs differently than contracts entered into subsequent to the creation of RECs?

For the reasons stated above, it is Wheelabrator's strong opinion that the Board is pre-empted by Section 210(e) from revisiting previously approved power agreements entered into pursuant to PURPA. As such, whether certain PURPA contracts contemplated more specifically the transfer of RECs than other agreements is a factual matter for the courts, not the Board. If the Board is asking whether it could revise its RPS rules to provide that future power sales agreements must transfer RECs to the purchasing utilities, Wheelabrator submits that such an approach may not be necessary. Most power sales contracts entered into since the passage of the RPS statutes – and certainly all power contracts entered into since the public emergence of this dispute - have explicitly allocated RECs to one contracting party or another.

Conclusion

For the foregoing reasons, the Board does not have jurisdiction to require Wheelabrator to transfer for no consideration RECs associated with the two Wheelabrator facilities to the utilities that purchase the power output from those facilities under the Wheelabrator Agreements. Nor is there any basis as a matter of State law or policy to conclude that such RECs can or should be transferred automatically and for no consideration under the Wheelabrator Agreements.

Respectfully submitted,

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Dated: September 23, 2004

<u>List of Attachments</u>

Attachment 1	Wheelabrator's Notice and Proposal dated July 1, 2004
Attachment 2	EPSA Filing before FERC
Attachment 3	Correspondence to Counsel for Wheelabrator from JCP&L and PSE&G
Attachment 4	Excerpts from Prior BGS Auctions

Attachment 1

STATE OF NEW JERSEY
BOARD OF PUBLIC UTILITIES

IN THE MATTER OF THE PROVISION OF BASIC GENERATION SERVICE FOR YEAR THREE OF THE POST-TRANSITION PERIOD	))))	Docket No. EO04040288

NOTICE OF APPEARANCE AND PROPOSAL

In accordance with the Decision and Order dated May 25, 2004, in this matter, Wheelabrator Falls Inc. ("WFI") and Wheelabrator Gloucester Inc. ("WGI") (collectively "Wheelabrator") hereby submit this Notice of Appearance and Proposal. The purpose of this filing is to address an ongoing dispute regarding the Renewable Energy Credits ("RECs") associated with various long-term power sales contracts between the State's electric distribution company utilities ("EDCs") and several non-utility generators ("NUGs"), including two contracts to buy the power output from the waste-to-energy resource recovery NUGs operated by Wheelabrator (the "Wheelabrator Agreements"). Wheelabrator fully expects this dispute to be raised by the EDCs in their Proposals in the current docket. Accordingly, Wheelabrator has filed this Notice of Appearance and Proposal to preserve its rights should the Board decide to address the issue of RECs ownership in the instant proceeding.

More specifically, Wheelabrator's position on this issue is twofold. First, for the reasons that follow, Wheelabrator respectfully suggests that the Board does not have jurisdiction over what is essentially a federal issue, i.e., whether the NUGs or the utilities are the owners of the RECs associated with PURPA facilities. Second, should the

Board decide to exercise jurisdiction over the issue, Wheelabrator will argue that the RECs associated with the WFI and WGI facilities are owned by Wheelabrator and were not conveyed to the purchasing utilities by the Wheelabrator Agreements. Most importantly, Wheelabrator urges the Board of Public Utilities (the "Board") not to repeat the unlawful and unreasonable "free pass" that it issued to successful BGS bidders in the most recent auction. Instead, the Board must require all successful bidders to comply with applicable renewable portfolio standards, including the procurement of RECs as contemplated by the Board's rules.

BACKGROUND

On January 29, 2004, the Board issued an Order in Docket No. EO03050394 (the "Order") regarding the RECs associated with various long-term power sales contracts between the State's EDCs and several NUGs, including the "Wheelabrator Agreements".

The Board issued this Order purportedly due to uncertainty created by a declaratory ruling by the Federal Energy Regulatory Commission ("FERC") on October 1, 2003 in American Ref-Fuel Company, et al. (105 FERC ¶ 61,004) (American Ref-Fuel"). There, FERC interpreted federal power sales laws to hold that long-term power sales agreements, such as the Wheelabrator Agreements, do not – in the absence of controlling language in the contract - automatically transfer RECs to the purchasing EDCs.[1] At the time of the Board's Order, the FERC decision was under consideration for rehearing pursuant to Motions that been filed by certain parties, including Jersey Central Power & Light Co. and Public Service Electric & Gas Co. Since the time of the

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[1] The Wheelabrator Agreements are silent on the matter of RECs.

Board's Order, the FERC has issued its Order denying said Motions for Rehearing and re-affirming its earlier decision (107 FERC ¶ 61,016; April 15, 2004). A petition for review was filed with the D.C. Circuit on June 14, 2004, on behalf of Xcel Energy Services Inc.

In its Order, the Board recognized that the State of New Jersey had not definitively determined whether the sale of wholesale power by NUGs to EDCs automatically transfers the ownership of state-created RECs. The Board ruled that, "until the State renders a final decision" and for the sole purpose of Renewable Portfolio Standards compliance requirements, for both the current Basic Generation Service ("BGS") suppliers and the winning bidders in the 2004 BGS auction, suppliers would be guaranteed a credit with an equivalent level of NUG RECs as would be available to them through the EDCs "assuming the EDCs had a definitely determined right to such RECs".

More specifically, the Board directed Board Staff and/or the REC Administrator, as the case may be, to recognize for current BGS suppliers, either as the direct result of NUG RECs being available through the EDCs or as an administrative credit to the EDCs, an equivalent level of NUG RECs as would be available to suppliers, through the EDCs, "assuming the EDCs had definitively determined rights to such RECs". The Board similarly ordered that Staff and/or the REC Administrator, as the case may be, recognize for winning bidders in the 2004 BGS Auction, for the term of their contract (as much as three years), either as the direct result of NUG RECs being available through the EDCs or as an administrative credit to the EDCs, an equivalent level of NUG RECs as would be available to them through the EDCs "assuming the EDCs had definitively determined rights to such RECs".

As noted above, Wheelabrator owns and operates two NUG facilities that sell power to two EDCs in New Jersey and that also have RECs associated with the facilities: Wheelabrator Gloucester Inc. sells its power under a long-term contract to Jersey Central Power & Light Co.; Wheelabrator Falls Inc. sells its power under a long-term contract to Public Service Electric & Gas Co. Both of these long term power sales contracts were entered into pursuant to the Public Utility Regulatory Policies Act of 1978 ("PURPA") and both of these Wheelabrator facilities are so-called PURPA Qualifying Facilities ("QFs").

On March 11, 2004, Wheelabrator filed a Notice of Appeal with the Appellate Division of the Superior Court of New Jersey (Appellate Docket No. A-3710-03). Wheelabrator has challenged the Board's Order due to its concern that the Board's Order amounted to a de facto determination of the rights and obligations associated with Wheelabrator's RECs. In particular, Wheelabrator maintains that the Board's conclusion that the BGS suppliers would be credited with the required amount of RECs regardless of the ultimate determination of who owns the RECs will depress the market price for the Wheelabrator RECs. Accordingly, Wheelabrator believes that the inescapable effect of this Order is to take Wheelabrator's property without just compensation.

In its Order, the Board indicated its intention to resolve the underlying issue of ultimate ownership of NUG RECs as soon as possible, and not later than prior to the start of the next BGS auction. While this has not yet happened, Wheelabrator expects the utilities to include in their Proposals suggestions that such a resolution be formulated in the current docket. Accordingly, Wheelabrator has filed this Notice of Appearance and Proposal to preserve its rights should the Board decide to address the issue of RECs ownership in the instant proceeding.

Wheelabrator's position on this issue is twofold. First, Wheelabrator questions whether the Board has jurisdiction to resolve what is essentially a question of federal law. Second, should the Board decide to assert jurisdiction over this issue, Wheelabrator will argue for its position that the RECs associated with the WFI and WGI facilities are owned by Wheelabrator and were not conveyed to the purchasing utilities by the Wheelabrator Agreements. As the FERC ruled in American Ref-Fuel, "contracts for sales of QF capacity and energy, entered into pursuant to PURPA, ... do not control the ownership of the RECs (absent an express provision in the contract)." Id. at Par. 23. Most importantly, regardless of the jurisdictional question, it is clear that the Board should not follow the same path it followed in the previous auction, which offered successful bidders a "heads you win, tails NUGs lose" proposition.

I. PURPA Preempts the Board's Review of Ownership of RECs.

Wheelabrator does not believe that the Board has jurisdiction to consider the terms of approved Electricity Purchase Agreements ("EPAs") between electric utility companies and PURPA QFs. The most fundamental legal concern with the Board's stated intention to interpret QF EPAs rests on the Supremacy Clause of the United States Constitution and the pre-emptive effect accorded to the PURPA and the Federal Power Act ("FPA"). Under a series of rulings by the federal courts, it has been determined conclusively that a state public utility commission's authority over wholesale power agreements is severely limited under the FPA.

Contracts between QFs and utilities are agreements for the wholesale sale of electric power. Jurisdiction over wholesale power contracts, including contracts involving QFs, is reserved by the FPA to the FERC.[2] The EPAs between electric companies and QFs such as Wheelabrator are contracts executed pursuant to PURPA. The only exception to the broad reservation of jurisdiction over wholesale contracts provided to FERC under the FPA is PURPA's narrow grant of authority to state utility commissions to determine in the first instance the avoided cost rate at which utilities can be required to purchase energy from QFs.[3] Otherwise, the FPA and PURPA severely limit the jurisdiction of utility commissions such as the Board over QF contracts. Once an EPA is approved, the Board has no authority to reconsider it.

In order to further the development of QFs, Congress ordered FERC to issue regulations which exempted QFs from "State laws and regulations respecting the rates,

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2 See Mississippi Power & Light Company v. Mississippi, 487 U.S. 354, 374 (1988) ("Congress has drawn a bright line between state and federal authority in the setting of wholesale rates and in the regulation of agreements that affect wholesale rates. States may not regulate in areas where FERC has properly exercised its jurisdiction to determine just and reasonable wholesale rates or to insure that agreements affecting wholesale rates are reasonable"); Nantahala Power & Light Company v. Thornburg, 476 U.S. 953, 966 (1986) (FERC jurisdiction over wholesale sales is "plenary" and a "State must . . . give effect to Congress' desire to give FERC plenary authority over interstate wholesale rates, and to ensure that the States do not interfere with this authority."); Transmission Agency of Northern California v. Sierra Pacific Power Company, *et al.*, 287 F. 3d 771, 780 (9th Cir.), amended, 295 F.3d 918 (9th Cir. 2002), cert. denied, 71 USLW 3283 (June 9, 2003) (the FPA "delegates to the Federal Energy Regulatory Commission 'exclusive authority to regulate the transmission and sale at wholesale of electric energy in interstate commerce.'") (citing New England Power Co. v. New Hampshire, 455 U.S. 331, 340 (1982)).

3 See Freehold Cogeneration Associates, L.P. v. Board of Regulatory Commissioners, 44 F. 3d 1178, 1191-92 (3d Cir.), cert. denied, 516 U.S. 815 (1995) (Board jurisdiction over wholesale power contracts is limited to procedures that "*implement* the requirements of section 210(a) [of PURPA] and the relevant regulations" but state action not involving such implementation is preempted by federal law) (emphasis in original).

or respecting the financial or organizational regulation, of electric utilities." Section 210(e) of PURPA, 16 USC § 824a-3(e); see 18 CFR § 292.602(c)(1).

PURPA and its implementing regulations therefore establish an "extensive federal system to encourage and regulate the sale of electrical energy by QFs." Freehold, supra, 44 F.3d at 1191. Under this federal system, once a state utility commission approves an EPA between an electric company and a QF on the grounds that the purchase rates are consistent with avoided cost, any action or order by the state commission to reconsider its approval is preempted by federal law. Id. at 1194. Any attempt to reconsider QF contracts impermissibly imposes utility-type regulation over QFs and is preempted. Id. at 1193.

In particular, any attempt by the Board to read the sale of RECs into these FERC-regulated PURPA agreements would be preempted under the contract non-interference principle enunciated in Freehold.[4] As the Freehold court stated, after a state commission has approved a QF sales arrangement, any attempt to "modify the [arrangement]....is 'utility-type' regulation – exactly the type of regulation from which [a QF] is immune under [Section 210(e) of PURPA]."[5]

[4] See also Smith Cogeneration Management, Inc. v. The Corporation Commission and Public Service Co. of Oklahoma, 863 P.2d 1227 (Okla. 1993).

[5] Freehold, 44 F.3d at 1192.

II. Regardless of the Jurisdictional Issue, the Board Must Not Issue Another Free Pass to BGS Suppliers

A. Absent Express Provisions to the Contrary, PURPA Contracts Do Not Convey RECs to a Utility that Purchases QF Power at Avoided Cost.

The arguments that the avoided cost-based EPAs somehow automatically transferred RECs to the utilities are clearly inconsistent with PURPA itself as well as the FERC's regulations implementing PURPA. Because avoided cost is designed to compensate for the energy and capacity generated by a QF only at the purchasing utility's alternative costs of generating or purchasing an equivalent amount of energy and capacity, a PURPA contract providing for avoided cost payments does not convey any renewable or other environmental attributes of the facility. To the contrary, compensation to QFs for non-power attributes such as RECs must be the subject of separate express provisions in a contract.

Both PURPA and FERC's implementing regulations expressly provide for the pricing of QF power at the purchasing utility's alternative cost of generating or producing the same amount of power. Thus, QFs are paid for energy and capacity produced by their facilities based on the purchasing utility's alternative costs of power from any power source, not on attributes of the selling QF.[6] Further, once a utility's avoided costs are determined, the same power purchase price applies to all QFs, be they renewable energy resources or fossil fuel-fired cogenerators.[7] Accordingly, avoided cost, as

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6 Indeed, where based on the cost of an incremental power plant addition, utilities' avoided costs have typically been based on fossil fuel-fired units. This is consistent with the methodology used in New Jersey.

7 "[T]he avoided cost that a utility pays a QF does not depend on the type of QF, i.e., whether it is a fossil fuel cogeneration facility or a renewable energy small power production facility. The avoided cost rates, in short, are not intended to compensate the QF for more than capacity and energy." American Ref-Fuel Company, 105 FERC ¶ 61,004, at Par. 22 (2003), rehearing denied 107 FERC ¶ 61,016, (2004).

defined by the FERC, compensates QFs for a generic energy and capacity product unrelated to the environmental attributes of the selling facility. What qualifies a facility as a QF under PURPA, including the use of renewable sources of energy, has no impact on the determination of avoided cost and should not be reflected in it.[8] As the FERC ruled on October 1, 2003, its avoided cost regulations governing mandatory purchases by utilities of electricity generated by QFs under Section 210 of PURPA "did not contemplate the existence of RECs and that the avoided cost rates for capacity and energy sold under contracts entered into pursuant to PURPA do not convey the RECs, in the absence of an express contractual provision." American Ref-Fuel Company, 105 FERC ¶ 61,004 at Par. 3, (2003), rehearing denied 107 FERC ¶ 61,016 (2004) ("American Ref-Fuel"). Avoided cost, therefore, cannot be deemed to compensate QFs for RECs associated with renewable generation.[9]

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8 "[FERC's] regulations are clear that the rate to be paid by utilities for electric energy be determined according to the avoided cost to the *utility* of generating that energy or purchasing it elsewhere, and not according to the QF's efficiency. . . . The cogenerator's efficiency is relevant in determining whether it qualifies under PURPA as a QF; however, the QF's efficiency is entirely unrelated to the *utility's* avoided costs." *Independent Energy Producers Association, Inc. v. California Public Utilities Commission*, 36 F.3d 848 (9th Cir. 1994) (emphasis in original). The concept of avoided cost thus reflects a balancing of the congressional interests reflected in section 210 of PURPA. Congress sought to encourage development of efficient cogeneration and alternative energy sources, but not to require utilities to pay more for QF power than the utilities' alternative cost of power from other sources. While cogeneration and small power production facilities must meet threshold ownership and technical standards to be eligible for any of the benefits of PURPA, QFs are not entitled to special payments for their environmental attributes under FERC's avoided cost rules. *See Southern California Edison Company, et al.*, 71 FERC ¶ 61,269 at 62,079 (1995) ("In promoting greater fuel diversity, however, Congress was not asking utilities and utility ratepayers to pay more than they otherwise would have paid for power").

9 In fact, the FERC has repeatedly held that environmental issues are inappropriately raised in the QF certification process and has rejected protests based on environmental factors. *See EcoElectrica, L.P.*, 77 FERC ¶ 61,344 at pp. 62,510 (n.2), 62,512 (n.8) (1996).

B. Environmental Attributes of Generation Are Also Treated Under FERC Precedent As Unbundled From the Sale of Power.

The approach adopted by the Board for the previous auction is also inconsistent with the FERC's precedent holding that environmental attributes of generation are separate and distinct from, and not conveyed with, power sales from the generating facility. For instance, the FERC has found that the trading of emissions allowances established under the 1990 Clean Air Act Amendments (CAAA) does not constitute the sale of electric energy subject to Part II of the FPA and can occur independently of the sale of power.[10] In another case involving a determination of exempt wholesale generator (EWG) status under section 32 of the Public Utility Holding Company Act of 1935 (PUHCA), the FERC found the sale of "green power certificates" associated with emission-free wind power – essentially the same as the RECs at issue in this case - to be an activity "incidental" to the business of owning and operating an eligible facility and selling electricity at wholesale.[11] This finding was necessitated by the FERC's determination that the sale of "green power certificates" was sufficiently different and separate from the sale of power as to raise an issue under FERC's "exclusivity" requirement for EWG status.[12]

These holdings apply with equal force to RECs associated with renewable QFs. Like emissions allowances and "green power certificates" allocated to generators, RECs associated with QFs are generation-related environmental attributes and are separate and distinct from the energy and capacity sold to the utility. The purchase of QF power

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[10] *Edison Electric Institute*, 69 FERC ¶ 61,344 (1994).

[11] *Madison Windpower, LLC*, 93 FERC ¶ 61,270 (2000).

[12] Section 32 of PUHCA requires that an EWG be engaged exclusively in owning or operating an eligible facility and selling electric energy at wholesale.

does not convey any rights over RECs. In finding that a buyer of power has no claims over emissions allowances allocated under the CAAA to the generator from whom the power was bought, the FERC noted that

> even if allowances awarded by [the Environmental Protection Agency] were viewed as an asset inextricably related to the operation of particular generating units between 1985 and 1987, *customers would have no more claim, by virtue of taking service during the 1985-1987 period, to the emissions allowances than they would have a claim on the generating units themselves.*[13]

These FERC precedents confirm that electric energy sales do not transfer products that may be unbundled from the energy and capacity sold. There is no reason to reach a different conclusion for RECs when QF power is sold under a PURPA contract.

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[13] *Southern Company Services, Inc., et al.*, 69 FERC ¶ 61,437 at 62,560 (1994).

Conclusion

For the foregoing reasons, regardless of whether the Board proceeds with its previously announced desire to resolve the question of ownership of NUG RECs, one thing should be clear. The Board should not repeat its prior decision to issue a free pass to BGS suppliers. All BGS suppliers should be made aware that they will need to satisfy their obligation to supply renewable energy, and not by merely waving a Board-supplied magic wand.

Respectfully submitted,

Lawrence W. Plitch
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Eight Grove Street, Suite 300
Wellesley, MA 02482
(781) 237-1911

James Laskey
Norris, McLaughlin & Marcus, P.A.
721 Route 202-206
Bridgewater, NJ 08807
(908) 722-0700

Counsel for
WHEELABRATOR FALLS INC. and
WHEELABRATOR GLOUCESTER INC.

Dated: July 1, 2004

Attachment 2

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

American Ref-Fuel Company Covanta Energy Company Montenay Power Corporation And Wheelabrator Technologies Inc.	))))))	Dockets No. EL03-133-000

MOTION OF THE ELECTRIC POWER SUPPLY ASSOCIATION FOR LEAVE TO INTERVENE OUT OF TIME AND GRANT THE PETITION

Pursuant to Rules 212 and 214 of the Rules of Practice and Procedure of the Federal Energy Regulatory Commission (FERC or Commission), 18 C.F.R. § 385.212 and 214, the Electric Power Supply Association (EPSA) respectfully files this motion to intervene out of time and express its support for the above petition and recommend that the Commission grant the relief requested.

I. Motion to Intervene Out of Time

EPSA is the national trade association representing competitive generators, including independent power producers, merchant generators and power marketers. These suppliers, who account for more than a third of the nation's installed generating capacity, provide reliable and competitively priced electricity from environmentally responsible facilities serving global power markets. EPSA seeks to bring the benefits of competition to all power customers.[1]

[1] The comments contained in this filing represent the position of EPSA as an organization, but not necessarily the view of any particular member with respect to any specific issue.

Many of EPSA's members have developed, owned and operated Qualifying Facilities (QFs) within the meaning of the Public Utility Regulatory Policies Act of 1978 (PURPA). In addition to having members who are active owners of QFs, EPSA has participated in many of the Commission's ongoing PURPA related proceedings. Since QF facilities will be affected by the Commission's interpretation of the avoided cost rules under PURPA in this case, EPSA has a direct and substantial interest in the outcome of this proceeding that cannot be adequately represented by any other party.

Under the circumstances, EPSA submits that good cause exists to grant it leave to intervene out of time and request the Commission grant the petition. First, the delay in filing was necessitated by the need to receive approval from its membership on this filing. Further, EPSA's late intervention would not prejudice or impose any undue burden on any party or otherwise disrupt or delay this proceeding as EPSA agrees to the record as it presently exists and will not seek to reopen, delay or defer any matter settled prior to the grant of this motion for intervention. Accordingly, given the interest in this proceeding, EPSA respectfully submits that it has good cause for intervening late in this proceeding.

All pleadings, correspondence and other communications concerning this proceeding should be directed to:

Julie Simon, Vice President of Policy
Jack Cashin, Senior Manager of Policy
Electric Power Supply Association
1401 New York Avenue, N.W., 11th Floor
Washington, D.C. 20005
(202) 628-8200

II. Background

On June 13, 2003, American Ref-Fuel Company, Covanta Energy Group, Montenay Power Corporation and Wheelabrator Technologies Inc. (the Petitioners) filed a Petition for Declaratory Order and Request for Expedited Consideration pursuant to Rule 207 of the Commission's Rules of Practice and Procedure, 18 CFR 385.207. The petition addresses the interpretation of the Commission's avoided cost regulations implementing PURPA. The Petitioners request that the Commission issue an order declaring that PURPA contracts do not automatically transfer to the purchasing utility "renewable energy credits" (RECs) or any similar tradable certificates associated with a PURPA facility, absent express provisions to the contrary.[2] The Petitioners also submit a separate but related issue of "whether avoided cost is intended to compensate a QF for RECs." [3]

III. EPSA Supports Parties' Motions That FERC Grant the Relief the Petitioner's Request

Under the existing rules, the avoided cost paid by the purchasing utility compensates the QF for the energy and the capacity generated. The sale of RECs, instead, compensates the QF for the facility's environmental attributes and rewards the risks associated with investments in, and the design and operation of, a renewable plant. EPSA agrees with Petitioners that prospectively allowing QFs to trade RECs associated with a renewable facility will facilitate the development of liquid and efficient markets for RECs. This will, in turn, create incentives for the development and use of renewable resources for power generation.

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[2] Petition at 1.
[3] Petition at 6.

EPSA supports the Petitioners' request that the Commission declare that, prospectively, power sales contracts under PURPA do not convey to the purchasing utility any RECs or similar tradable certificates. The power purchase price a utility pays under a PURPA contract requires that it compensate a QF only for energy and capacity produced by the QF. Consequently, the utility has not contracted for any environmental attributes that could be associated with the QF, placing other attributes of the QF outside of the terms and conditions of the PURPA contract. The Commission should not permit purchasing utilities to seek further consideration outside of their PURPA contracts. These contracts are based on avoided cost, which, as the petitioner's note, "is designed to compensate only the energy and capacity generated by the QF at the purchasing utility's alternative cost of generating or purchasing an equivalent amount of energy and capacity…." What qualifies a QF as a renewable energy resource is entirely irrelevant in determining avoided cost and should not be reflected in the purchase price paid to QFs. Indeed, all QFs, renewable or non-renewable, receive the same purchase price from a utility once the utility's avoided cost is set. The contracted purchase price, therefore, cannot be deemed to compensate QFs for RECs associated with renewable generation.

The QF developers have taken on the risk of designing and constructing a plant that will be a viable long-term investment meeting rigorous environmental standards qualifying for the RECs as a renewable facility. It is only through this incentive structure that renewable QF generating technologies will be able to contribute both to environmental and reliability policy goals of the Commission. Therefore, RECs need to remain a possible incentive that power plant developers can strive to meet.

IV. CONCLUSION

WHEREFORE, for the reasons set forth above, EPSA respectfully requests that the Commission grant its motion for leave to intervene out of time and urges the Commission to act promptly and decisively to grant the relief Petitioners have requested.

July 25, 2003

Respectfully submitted,

Julie Simon

Julie Simon, Vice President of Policy
Jack Cashin, Senior Manager of Policy
Electric Power Supply Association
1401 New York Avenue, NW 11th Floor
Washington, D.C. 20005
Tel: 202-628-8200
Fax: 202-628-8260

CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the comments by first class mail, postage prepaid, upon each person designated on the official service list compiled by the Secretary in this proceeding.

Dated at Washington, D.C., July 25, 2003.

Julie Simon

Julie Simon

Attachment 3

Jersey Central
Power & Light
A FirstEnergy Company

300 Madison Avenue
P.O. Box 1911
Morristown, New Jersey 07962-1911

January 27, 2003

Lawrence W. Plitch, Esq.
McCauley & Plitch, LLC
Eight Grove Street
Suite 300 Wellesley, MA 02482

Re: Wheelabrator Gloucester Company, L.P.

Dear Mr. Plitch:

This will acknowledge receipt of your letter dated November 27, 2002 concerning the Power Purchase Agreement (the "PPA") between Jersey Central Power & Light Company ("JCP&L") and SES Gloucester Company, L.P. ("Wheelabrator") dated October 27, 1987 related to the Gloucester County Resource Recovery Project (the "Gloucester Facility"). Specifically, your letter seeks to address the renewable energy attributes ("REAs") associated with Wheelabrator's Gloucester Facility output, regarding which you contend the PPA is silent. You conclude from this observation that the PPA does not address the Gloucester REAs and, accordingly, that they were not transferred to JCP&L thereunder. Your client's interest in raising this issue at this time is apparently motivated by the receipt of certain offers from third parties seeking to purchase the REAs associated with the Gloucester Facility.

JCP&L appreciates that Wheelabrator's receipt of offers from third parties seeking to purchase the REAs might invite an exploration of whether such attributes are available for sale. However, JCP&L is disappointed that Wheelabrator does not appreciate that the Gloucester Facility REAs are spoken for already.

Briefly stated, JCP&L's review of the PPA indicates that JCP&L and Wheelabrator entered into the PPA because Gloucester desired to sell and JCP&L desired to purchase the "net electrical output of the Facility." (PPA at p.1.) Net Electric Energy is defined as the electricity generated by the Gloucester Facility, less transformation and transmission line losses. (PPA at p.5.) Admittedly, there is no specific reference to REAs in the PPA, which is understandable given that such term was not part of industry parlance at the time the PPA was entered into. However, this observation is hardly determinative since the PPA's disposition of the "net electrical output of the Facility" necessarily includes the disposition of all of the attributes attendant to that electrical output, including the environmental benefits which, today, may be described to include the REAs.

The PPA represents a bundled transaction for the net electrical output of the Gloucester Facility, in which the pricing mechanism (as established by Orders of the New Jersey Board of Public Utilities ("BPU")) reflects the unique value associated with "Qualified Facility" ("QF") production, including its environmental benefits. That fact is not changed by the development, in some sections of this country (not yet including PJM), of a market for the purchase and sale of certain REAs (separate and apart from the energy itself). The ability to now delineate, identify or separately value the renewable characteristics or qualities of that same output product does not change the inherent nature, quality and characteristics of the product that JCP&L purchased when it entered into the PPA. Those characteristics and qualities were essential and integral aspects of the output purchased at the time the PPA was entered into, just as the biomass, waste or renewable resource energy source was essential to the Gloucester Facility's qualification as a

QF. Any other conclusion would deprive JCP&L, and, more importantly, its ratepayers, of the benefit of the bargain entered into in 1987.

I am advised by counsel, that the Public Utility Regulatory Policies Act of 1978 ("PURPA"), and associated BPU Orders related to the implementation of PURPA, support JCP&L's views as expressed above. PURPA, among other things, encouraged the development of small power production as a means of energy conservation and efficiency by requiring electric utilities to purchase from such facilities at their avoided costs. Indeed, in 1981 when the BPU first established standards for the calculation of avoided costs, it specifically recognized the environmental benefits related to the small power producers' use of biomass, waste, or renewable resources when it stated that "[r]eliance on these sources of energy can reduce the need to consume additional fossil fuels to generate electric power." (Order entered October 14, 1981 in Docket No. 8010-687.) Thus, the same environmental elements that were included in the bundled product purchased by JCP&L, as discussed above, also put Wheelabrator in a position to negotiate the PPA in the first instance.

In your letter, you also suggest that "GPU has transferred the renewable energy attributes (REAs) associated with Wheelabrator's Gloucester Facility output to the winning bidders of JCP&L load obligations in New Jersey's Year 4 BGS [i.e., Basic Generation Service] Auction." Further, you express a concern that JCP&L "intends on transferring the Gloucester Facility REAs to the winning bidders in the Year 5 BGS Auction as well." We are uncertain as to the basis for your conclusions that JCP&L has transferred the REAs in connection with the Year 4 BGS auction process or that it intends to do so in the Year 5 process.

For Year 4, which began on August 1, 2002, JCP&L made no reference to the REAs or to credits for purposes of meeting the requirements of the New Jersey Renewable Portfolio Standards. JCP&L does not provide to any winning bidder the energy or capacity or ancillary services associated with Committed Supply, which, by definition, includes power supplies associated with, among other things, non-utility generation contracts, such as the PPA. Winning bidders have been provided only with a pro-rata share of the capacity credits associated with Committed Supply. Just as had been the case in the months preceding August, JCP&L will continue to utilize the environmental attributes associated with qualified Class I or Class II renewable resources in its Committed Supply portfolio in such a way as to assure that they benefit JCP&L's BGS customers.

For Year 5, the specific process whereby such benefits will be preserved for JCP&L's BGS customers is specified as a pro-rata crediting mechanism that ties the benefits to the specific BGS supply tranches.

In JCP&L's view, neither the Year 4 nor Year 5 BGS auction treatment constitutes a transfer of the REAs. Instead, JCP&L's approach in either year is a method for accounting for them in a manner that preserves their benefit for the intended beneficiaries of the PPA - - JCP&L's ratepayers. However, were JCP&L to determine that transfer was the best, preferred or the necessary method for preserving such benefits for ratepayers, JCP&L believes it has an absolute right to do so.

Finally, your letter indicates a willingness to discuss possible solutions to this issue. JCP&L is willing to meet with your client to discuss these matters. However, please understand that, even if JCP&L were agreeable, Wheelabrator's apparent desire to now unbundle the REAs from the net electrical output of the Gloucester Facility (e.g., by buying them back from JCP&L) would require re-negotiation of the PPA, and a BPU Order approving any resulting amendment. Please let me know if your client desires to meet to discuss these matters.

Very truly yours,

Michael J. Filippone

Michael J. Filippone
Director
Rates & Regulatory Affairs-NJ

Public Service Electric & Gas
80 Park Plaza, Newark, NJ 07102-4194
tel: 973.430.7000

PSEG

February 11, 2003

Lawrence Plitch, Esq.
8 Grove Street
Wellesley, MA 02482

Dear Larry:

I apologize for the delay in getting an answer to you. This letter is responsive to our telephone conversation of January 15, 2003, wherein you, on behalf of Wheelabrator Falls Incorporated, inquired about Public Service Electric and Gas ("PSE&G") Company's position on renewable energy certificates or other renewable attributes (sometimes referred to as "renewable energy credits" or "RECs") produced by Wheelabrator Falls. PSE&G interprets the definition of Contract Power Output in our power purchase agreement as including all the renewable attributes.. Furthermore, it appears clear to us that the Board of Public Utilities in "Order Adopting Interim Renewable Portfolio Standards" (Docket No. EX99030182), dated June 12th, 2001, also uses this approach. PSE&G is aware of no federal and/or New Jersey law or regulation that would enable Wheelabrator Falls Inc. to unbundle RECs from Contract Power Output.

Should you have any questions regarding this matter, please call me at 973-430-6686.

Sincerely,

S. Wodakow

Sy Wodakow

cc:

Gregory Eisenstark, Esq.

Attachment 4

NJ BPU RENEWABLES PORTFOLIO STANDARD

Qualifying Power Purchases for PSE&G's BGS Requirements
Data for Calander Year 2000

Class I
(solar, wind, geothermal, tidal, wave, fuel cell, landfill gas, "sustainable" biomass).

Edgeboro Landfill	10 MW	80,269 MWh
Kinsley's Landfill*	2.6 MW	33 MWh

*Undergoing extensive refurbishment

Class II
(trash-to-energy, "non-sustainable" biomass, "environmentally-sound" hydro power).

Great Falls Hydro	11 MW	20,096 MWh
American Ref-Fuel (Essex Co MSW)	65 MW	464,991 MWh
Wheelabrator Falls (MSW)	48 MW	333,352 MWh

Using data for the September 2000 through August 2001 period, and assuming BGS at 95% of the total retail energy, the BGS energy total for PSE&G would have been approximately 18 million MWh for the August-December period, and 25 million MWh for the January-July period.

For illustrative purposes, applying the Class I requirements of 0.5% and 0.75% for the years 2002 and 2003, respectively, produces a total of about 275,000 MWh as the Class I total for the bid period. Thus PSE&G's existing contracts would, under these assumptions, have produced about 29% of the Class I Requirement. Assuming 96 tranches, each winner would then need to demonstrate a "good faith effort" to acquire just over 2,000 MWh of Class I resources per tranche.

Applying the Total (Class I and II) requirements of 3% and 3.25% for 2002 and 2003, respectively, produces a Total requirement of about 1,343,000 MWh. Thus PSE&G's existing contracts would, under these assumptions, have produced 60.9% of the Total Requirement, requiring each winner to supply another 3,500 MWh per tranche of Class II resources.

Company: GPUE
Type: Green Energy
Range: Nov-99 to 2-Aug
Unit: MWh
Frequency: Monthly
Updated: 9/19/2002

Date Green Type	Hamms Landfill Class 1	L + D Landfill Class 1	Manchester (Mrpc) Class 1	Monmouth (Mcrc) Class 1	Camden Class 2	Gloucester County Class 2	Great Bear Class 2	Warren County Class 2
Nov-99	629	640	3239	4980	12455	7582	84	4930
Dec-99	582	665	2058	5751	15070	8286	136	6751
Jan-00	502	591	2092	5105	12228	8462	113	7470
Feb-00	507	387	3200	4531	10711	7235	142	6287
Mar-00	667	668	3410	5428	9687	8317	283	6398
Apr-00	613	152	3304	5110	6514	6838	229	4313
May-00	650	0	3326	4564	13741	4915	185	7300
Jun-00	652	0	3286	3307	11815	8363	165	6370
Jul-00	681	0	3403	2990	8909	8648	78	6334
Aug-00	672	0	3400	4116	8454	8578	176	5780
Sep-00	651	0	3164	4116	6803	8549	83	5164
Oct-00	692	0	3379	5233	12420	7967	37	5918
Nov-00	664	0	3270	4729	10457	8228	43	7190
Dec-00	633	0	3406	4888	11219	8186	84	6259
2-Jan	694	0	3329	5260	9838	7056	115	7068
1-Feb	653	0	3098	4998	5081	7643	167	5916
1-Mar	695	0	3424	5777	8850	8076	284	4806
2-Apr	717	0	3342	4988	10593	6230	247	6081
2-May	752	0	3439	4601	14396	8307	130	6997
1-Jun	726	0	3339	3781	13800	7771	153	6682
1-Jul	748	0	3416	4311	13721	7994	48	6607
1-Aug	747	0	3407	2984	12974	8170	15	6510
1-Sep	516	0	3332	4706	13888	7607	14	4898
1-Oct	759	0	3451	5070	12228	8526	9	6359
1-Nov	709	0	3363	4772	14154	8118	9	7297
1-Dec	730	0	3503	5780	15660	7434	17	7414
2-Jan	745	0	3408	5710	14010	8660	18	7561
2-Feb	678	0	3121	5710	13404	7619	20	6515
2-Mar	741	0	3440	5382	12385	6243	44	6405
2-Apr	709	0	3032	5055	8123	8169	109	4569
2-May	665	0	3425	5147	15724	8747	215	7415
2-Jun	712	0	3298	4332	14195	7093	145	6767
2-Jul	720	0	3366	4069	14713	8597	27	6688
2-Aug	757	0	3391	3830	13325	7560	6	6717
2-Sep	733	0	3249	2442	13747	7362	5	4481